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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 383

C-O-TWO FIRE EQUIPMENT COMPANY and MAYNARD A. LASWELL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

FRANCIS R. KIRKHAM,
RICHARD J. MACLAURY,
WILLIAM E. MUSSMAN,
Standard Oil Building, San Francisco 4, California,
Attorneys for Petitioners.

PILLSBURY, MADISON & SUTRO,
Standard Oil Building, San Francisco 4, California,
Of Counsel.

PARTRIDGE-WALKER PRINTING CO., SAN FRANCISCO, CALIFORNIA

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DARK PAGE BLEED THRU

In the Supreme Court
OF THE
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October Term, 1952

No. _____

C-O-Two Fire Equipment Company and Maynard A. Laswell,
Petitioners,

vs.

United States of America,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The above-named petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United Sates Court of Appeals for the Ninth Circuit entered in the above-entitled cause (R. 242),[1] affirming

[1]Unless otherwise noted all record references are to Vol. I.

the judgment of the District Court for the Southern District of California, Central Division (R. 34).

OPINIONS BELOW.

The findings of fact and conclusions of law of the District Court are at pages 37-48 of the record. No opinion was filed by the District Court. The opinion of the Court of Appeals (R. 220) is reported in 197 F. 2d 489. The dissenting opinion of Pope, J., on rehearing (R. 244) is reported in ____ F.2d ____.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 29, 1952. A timely petition for rehearing was denied, Pope, J., dissenting, on August 11, 1952. On August 28, 1952, Mr. Justice Clark extended the time within which to file a petition for a writ of certiorari to and including October 10, 1952. Jurisdiction of this Court is invoked under section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

1. In a criminal prosecution under section 1 of the Sherman Act may a judgment of conviction be sustained where it rests solely upon circumstantial evidence, without any direct proof of conspiracy, and where each of the circumstances proved consists of a normal, lawful business practice or occurrence which reasonably could

be expected to exist in the absence of conspiracy, and where *all* of such circumstances reasonably could be expected to *co-exist* in a normal competitive market and in the absence of conspiracy?

2. May an inference of criminal conspiracy to fix prices be drawn from the fact that each of a number of competitors follows the practice of selling its products throughout the United States at a single delivered price?

3. May an inference of criminal conspiracy to fix prices be drawn from the fact that each of a number of competitors belongs to and attends meetings of a trade association?

4. May an inference of criminal conspiracy to fix prices be drawn from the fact that each of a number of competitors follows the practice of suggesting resale prices to its dealers?

5. May an inference of criminal conspiracy to fix prices be drawn from the fact that each of a number of competitors manufactures similar products, where the products are ordinary industrial implements and similarity is the result of functional properties and commercial demand?

STATUTE INVOLVED.

The statute involved is section 1 of the Sherman Act (Act of July 2, 1890, c. 647, sec. 1, 26 Stat. 209, as amended).

STATEMENT OF THE CASE.

The petitioners, C-O-Two Fire Equipment Company and one of its vice presidents, Maynard A. Laswell, were indicted on June 15, 1949, together with Walter Kidde & Company, The General Pacific Corporation, American-La France and Foamite Industries, Inc., and two other individuals, in the United States District Court in Los Angeles. Defendants were charged with having conspired to restrain trade in violation of section 1 of the Sherman Act. The conspiracy was alleged to have commenced in January, 1947, and to have consisted of a continuing agreement among the defendants (a) to fix and maintain uniform prices, terms and conditions of sale under which portable carbon dioxide fire extinguishers manufactured by the corporate defendants were to be sold to ultimate purchasers in the Southern California area; (b) to publish and distribute to their dealers price lists at which each of the defendants sold carbon dioxide fire extinguishers to dealers; (c) to require dealers to maintain and adhere to the prices fixed by the defendants; (d) to sell only to dealers who maintained the prices and not to sell to those who did not; and (e) to quote and submit identical bids to public and governmental agencies in the Southern California area and to require their dealers to do likewise.

Three of the defendant corporations and two individual defendants entered pleas of nolo contendere (R. 207). Petitioners C-O-Two Fire Equipment Company and Maynard A. Laswell pleaded not guilty (R. 205), waived a jury (R. 207) and proceeded to trial on October 24, 1950 (R. 51). On February 26, 1951, the District Court

entered judgments of guilty (R. 36-37) and on March 25, 1951, filed findings of fact and conclusions of law (R. 37-48).

On May 29, 1952, the Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court (R. 242). A petition for rehearing was denied on August 11, 1952 (R. 244), Circuit Judge Pope dissenting (R. 244).

This case, a criminal action, is extraordinary in several respects. Not a fact is in dispute. The trial occupied less than a day and a half; the entire record consists of only 112 pages of testimony, two short stipulations of fact, and a relatively small number of exhibits. The evidence introduced by the Government was entirely circumstantial. The sole question involved—whether the circumstances proved are sufficient to support a finding of conspiracy in a criminal prosecution under section 1 of the Sherman Act—is one of law, readily determinable on a short record and without resolution of controverted facts. This primary question, as we point out herein, involves other important questions of law decided ~~we~~ in conflict with decisions of this Court.

In summary, the proof was this:

Industry Background.

The products involved are portable carbon dioxide fire extinguishers, which are manufactured and sold by defendants in sizes (designated "models") ranging from 2 pounds to 150 pounds (R. Vol. II, 200-300). The four defendant corporations (and one other corporation, The

General Detroit Corporation, which owns a controlling interest in defendant The General Pacific Corporation (R. 16)), manufacture approximately 90 per cent of these extinguishers sold in the United States (R. 26-75). The business is relatively small. The total value of all such extinguishers manufactured in the United States is a little over $6,300,000 a year (R. 26). In each of the years covered by the indictment no one of the defendant corporations had annual sales in excess of $2,276,000 throughout the entire United States, nor more than $115,000 in the Southern California area involved in this indictment (R. 26-27).[2]

Patent License Agreements.

Defendant Kidde was the owner of patents covering certain devices embodied in carbon dioxide fire extinguishers. These included the Minor patent issued May 27, 1930 (R. Vol. II, 195-198), which covered an important device essential to the efficient operation of such extinguishers.[3] On August 24 and 25, 1932, Kidde entered into identical patent license agreements with C-O-Two and American-La France, respectively (R. Vol. II, 3, 43),

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[2]The sales figures for the respective companies for 1948 were as follows (R. 26-27):

	Nation wide Sales	So. Cal. Sales
C-O-Two Fire Equipment Company...	$1,489,368.35	$ 34,002.98
Walter Kidde & Co.	2,275,638.23	108,637.11
American-LaFrance Foamite Corp. ...	669,687.29	20,231.70
General Pacific Corporation	299,367.00	87,924.00

[3]For a description of the patented device and its functions, see *Randolph Laboratories v. Specialties Development Corp.* (D.N.J. 1949) 82 F.Supp. 316 (affirmed 178 F.2d 477). In that case the Minor patent was held invalid on the prior art, but only after good faith and sharply contested litigation. The court pointed out that the patented device was an important and essential development.

each of which contained price-fixing provisions (R. Vol. II, 8 et seq., 48 et seq.),[4] and for a period of ten years price schedules under these provisions were in effect (R. 169). On December 30, 1944, General Pacific (which had entered the field in 1942) also acquired a license under the Minor patent (R. Vol. II, 150). This license (unlike the 1932 licenses to C-O-Two and LaFrance) did not institute a price-fixing arrangement but only gave the licensor the right to require sales at fixed prices at a future time and on 60 days' notice, and then only if, before the exercise of such right, this Court had not held such provisions invalid (R. Vol. II, 153).[5]

On August 24, 1942, more than four years before the commencement of the alleged conspiracy in this case, the price-fixing provisions of the license agreements of 1932 were abrogated and were never reinstated (R. 169-171).[6] The right to institute a schedule of prices under the 1944 General Pacific license never was exercised.

Defendants' Consumer Prices.

The Government introduced the available price lists of the defendant corporations from 1932 to 1949 (R. Vol. II,

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[4]While the legality or illegality of these 1932 licenses is immaterial in this case, it is important to remember that at the time they were made this Court recently had sustained the validity of such provisions in *United States v. Gen.Elec. Co.* (1926) 272 U.S. 476, 490.

[5]This provision was embodied in the license while the *Gypsum* case was pending in the district court—four years before the decision of this Court in that case (*United States v. Gypsum Co.* (1948) 333 U.S. 364.)

[6]By letter agreement with Specialties Development Corporation, a wholly owned subsidiary of Kidde, which in the meantime had acquired all of Kidde's rights as owner of the patents (R. Vol. II, 33).

200-300). These lists give each of the defendants' net consumer prices, i.e., the prices at which the respective companies sold direct to consumers. By stipulation it was agreed that each of the defendants suggested that these prices be charged by its dealers.[7]

The price lists show that during the entire period covered by the price-fixing provisions of the license agreements the prices of all defendants were identical, as by contract they were required to be; that, in contrast, for nearly a year following the abrogation of the price-fixing provisions intense price competition prevailed, price changes were frequent, and the prices of the several defendants varied at all times; that thereafter, in the fall of 1943, as the war progressed and prices were under Government control, and with war orders accounting for virtually all production (R. 175), the prices of all defendants reached a common level and continued without change until the end of the war; that after the war and the lifting of price controls, the prices of the several defendants increased from time to time, but at no time simultaneously, and at no time without significant intervals when prices differed during periods of price moves (for record references and a further discussion of these prices see p. 12, infra).

The price lists also show that each of the defendants quoted a national delivered price and that, following the

[7]The Government did not raise any question or introduce any proof as to the prices of any of the defendants at the wholesale level. It conceded at the trial that there were differences between one company and another in the prices of each to its dealers (R. 147).

war and as costs increased (R. 176), the prices of each of the defendants increased from time to time.

Similarity of Products.

As noted above, portable carbon dioxide fire extinguishers are manufactured in different sizes, designated "models." Each of the defendants at all times has manufactured a 10, 15, 50, 75 and 100-pound model. As to other size models (nine in number since 1942) there has been wide diversity in practice among the defendants with respect to the dates on which such models were brought out and the periods during which they were sold. (For record references and a further discussion of these models, see p. 30, infra.) Models of the same size manufactured by each of the defendants are virtually identical in appearance (R. 174).

Trade Association.

It was stipulated at the trial that each of the four defendant corporations belonged to a trade association named "Fire Extinguisher Manufacturers' Association, Inc."; that during the years 1946-1950 each company had employees on the Carbon Dioxide Committee of that association; that at nine specified places and times during the period 1947-1949, this committee held meetings at regular conventions of the association which were attended by various employees of defendants (R. 16-23, 159). There is *no other evidence* concerning this association, this committee, or the activities of either.

Government Bids.

The record contains evidence of three invitations to bid by public bodies during the three-year period covered by the indictment to which two or more of the defendants responded (R. 81-91, 92-95, 95-97, R. Vol. II 323-335, 336-337, 338-341). Each invitation was for a relatively small number of extinguishers by municipal bodies in Los Angeles, and each defendant who submitted bids did so at its current list prices, which at the time were the same.[8] Of the three bids, the two largest in dollar volume were for $3,660 each, for sixty 20-pound extinguishers (R. Vol. II, 336, 338). The other bid called for 104 assorted models of a total dollar value of $2,982.50 (R. Vol. II, 323-324). At the time of these bids the price lists of the defendants showed posted quantity discounts for orders of 25-99, 100-499, 500 and over (R. Vol. II, 203-214).

The record also shows that in two instances C-O-Two dealers, each of whom bid at less than C-O-Two's suggested consumer prices, were admonished by representatives of C-O-Two[9] and thereafter withdrew or attempted to withdraw their bids (R. 116, 120, 132, 134). There was no testimony that any other defendant had knowledge of these instances, or at any time or in any way ever admonished or "policed" any of its dealers.

The Court of Appeals recited each of the foregoing circumstances *seriatim* and found that, when they were

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[8] On one bid American-LaFrance's bid was in excess of its list prices, but this was shown to have resulted from a clerk's error (R. 89).

[9] Or by representatives of the Pyrene Manufacturing Company, which owns 65 per cent of the stock of C-O-Two, and which acts as sales agent for it (R. 166).

considered together, they "spelled out" the "irresistible conclusion" (R. 228) that defendants were guilty of a price-fixing conspiracy.

We submit that this decision is untenable and in conflict with decisions of this Court.

REASONS FOR GRANTING THE WRIT.

The court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and has rendered a decision in conflict in material respects with the applicable decisions of this Court and with decisions of the courts of appeals of other circuits.

The decision of the court below announces a new concept of conspiracy, a concept which is both inconsistent with the decisions of this and other courts and contrary to basic principles of criminal justice. The implications were underscored by Judge Pope in his dissent to the denial of rehearing when he observed that "the opinion plows much new ground" (R. 245).

In this case the Government proved that each of the defendants followed a number of separate business practices. These practices are considered separately in the following pages of this petition. The court below held, as to each of certain of these practices, that proof by the Government that all of the defendants followed such practice was sufficient to establish a *prima facie* case of conspiracy to fix prices, thus shifting to the defendants the burden of explanation. In each of these holdings we submit the court below rendered a decision contrary to the decisions of this Court.

The court also held that even if proof by the Government that all of the defendants followed any one of these practices were insufficient in itself to establish a conspiracy to fix prices; still, proof that all of the defendants followed *all* of these practices was sufficient to show conspiracy. As to this we agree with the circuit court that a conspiracy is "not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole" (R. 232). But we do contend that proof of a number of separate and unrelated circumstances (business practices), wholly innocent in themselves, and all of which *reasonably* can be expected to *co-exist* in a state of innocence (a competitive market), cannot furnish the basis for the conviction of crime.[10] And we contend that this is the situation in the case at bar.

A. In holding that the record does not reveal any price competition, "as might be expected," in the industry after the abrogation of the price-fixing provisions of the license agreements, and that such abrogation was "not a thing of substance," the court below so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The only evidence in this record which possibly can be pointed to as linking the several defendants in any conduct is the fact that each was a party to the old license agreements under which the prices of all admittedly were fixed by Kidde, the licensor (supra, p. 7). But the

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[10]As, for example, if the Government should indict three grocers for price fixing, and prove (a) that each charged five cents a package for gum; (b) that each opened his store at 8 in the morning and closed at 6, and (c) that each followed the practice of delivering groceries to the homes of his customers.

record is undisputed that this link was completely and permanently broken.

On August 24, 1942, more than four years before the commencement of the alleged conspiracy, the price-fixing provisions of the licenses were abrogated by formal written agreement (R. 170). Mr. Allen, president of C-O-Two, testified that these provisions "were never reestablished after the date of this letter" (R. 171).

The court below rejected this uncontradicted testimony. It said (R. 237):

> "• • • nor was any evidence introduced to dissipate the inference of conspiracy arising from the history of licensing agreements with minimum price maintenance provisions, save for the bare statement that such provisions were abrogated."

And again (R. 227):

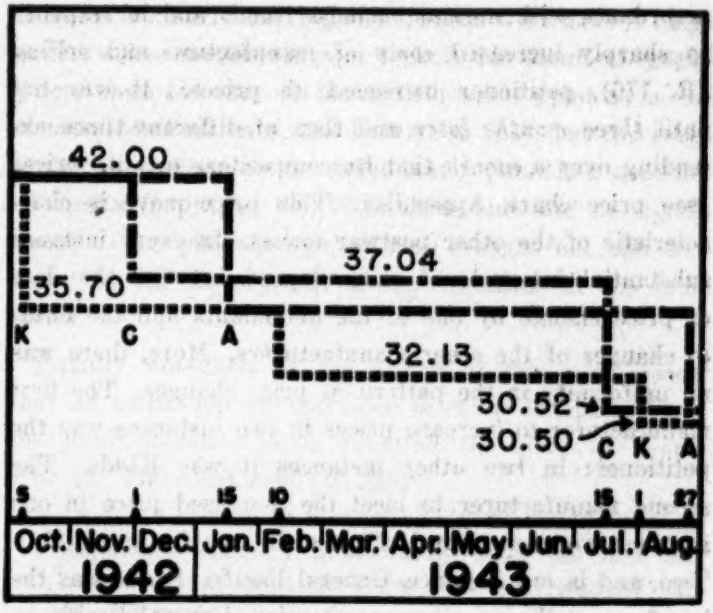
> "The record, however, does not reveal any price competition, as might be expected, in the industry after the alleged abrogation of the price maintenance provision."

The patent and uncontroverted facts are to the contrary.

To this petition, as an appendix, we attach a chart showing the published prices of each of the defendants for the period January 1, 1938, to the date of the indictment, June 15, 1949.[11] This chart demonstrates the integ-

[11]The 10-pound model (the model selected by the Government for charting (R. Vol. II, 352)); the 15-pound model (the largest selling model); and the 100-pound model (the largest model manufactured by all the defendants) are charted. An examination of all the price lists (R. Vol. II, 200-300) discloses that the price pattern as to all other models is no less competitive.

rity of what the court below called the "bare statements" of petitioners. It shows the complete change which occurred in the pricing conduct of each of the defendants after the abrogation of the price-fixing provisions. For four and one-half years preceding the letter agreement of August 24, 1942, there was not one hour of one day during which the price of a single manufacturer for a single model varied by a fraction of a cent—as by contract the parties had agreed. *In contrast, immediately* after *the price-fixing provisions were abrogated an eleven-month period ensued during which there was not one hour of one day in which the prices of all defendants were the* same *for a* single *model.* For convenience, we produce at this point a detail of the pricing chart (on the 10-pound model—the model selected by the Government for charting (R. Vol. II, 352)) covering this eleven-month period.



C-O-Two Fire Equipment Co. C —·—·—
American-La France and Foamite Industries, Inc. A — — —
Walter Kidde and Company, Inc. K ·····

It would be difficult, we submit, to find a more dramatic demonstration of a complete break of a price-fixing agreement.

With this break demonstrated, the conduct of the defendants over the succeeding years appears not only consistent with, but affirmatively shows, a competitive pattern (see price chart, Appendix). Prices reached a common level during the war and remained that way until after the war and the lifting of controls. Thereafter, in

accordance with normal business trends and in response to sharply increased costs of manufacture and selling (R. 176), petitioner increased its prices. It was not until *three months later* and then at different times extending over a month that its competitors met its prices (see price chart, Appendix). This price move is characteristic of the other postwar moves. In every instance substantial intervals of time elapsed between the date of price change by one of the defendants and the dates of changes of the other manufacturers. More, there was no uniformity in the pattern of price changes. The first manufacturer to increase prices in two instances was the petitioner; in two other instances it was Kidde. The second manufacturer to meet the increased price in one instance was American-LaFrance, in two instances, C-O-Two, and in one instance, General Pacific. Kidde was the last to meet the price on one occasion, General Pacific on another and American-LaFrance on still another.[12]

It is true that during most of the time the prices of all manufacturers on these competitive products were the same. But this alone is not evidence of conspiracy.[13]

The fact that on three occasions list prices were quoted for relatively small quantities of fire extinguishers on bids called for by local governmental bodies in no way

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[12]See price chart, Appendix to this petition.

[13]*Pevely Dairy Co. v. United States* (8 Cir. 1949) 178 F.2d 363, 369: "We are clear that mere uniformity of prices in the sale of a standardized commodity such as milk is not in itself evidence of a violation of the Sherman Anti-Trust Act."

United States v. Int. Harvester Co. (1927) 274 U.S. 693, 708-709;

United States v. Standard Oil Co. of New Jersey (E.D. Mo. 1931) 47 F.2d 288, 316-317;

Fort Howard Paper Co. v. Federal Trade Com'n (7 Cir. 1946) 156 F.2d 899, 905.

detracts from this showing. These bids were not for large orders where the Government proved that identical special prices were bid (say to the sixth decimal point as in the *Cement Institute* case, 333 U.S. at p. 713), but for small quantities falling within defendants' published quantity discounts (supra, p. 10). That these bids add no significance to the published prices was brought out and conceded by the Government at the argument in the court below.[14]

Equally untenable is the ruling of the court below that an additional circumstance showing conspiracy was the price increase which followed the close of World War II. The court said (R. 239):

> "• • • *a survey of market conditions* in the fire extinguisher industry immediately after the last war indicates that although there was a substantial surplus of such extinguishers on the market (put there by the government), the defendant corporations increased their prices. Price increases which occur in times of surplus or when the natural expectation would be a general market decline, must be viewed with suspicion. *Yet appellants offer no evidence to dispel doubts as to the legitimacy of their activities.*"

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[14] "Judge Pope: I suppose if they used the list prices in each of those cases they were identical.

Mr. Dixon: That is correct. The Government contends that that is the fact, and there isn't any evidence here to the contrary.

Judge Pope: If, for instance, they did that, I presume we may assume that they quoted those identical prices to private manufacturers who wanted these products • • •. If that is conceded, there isn't anything added to the case, is there, by the fact that when the City of Los Angeles wanted fire extinguishers, they likewise gave identical list prices, price quotations to the City?

Mr. Dixon: No, I believe, Judge Pope, the fact that identical bids were submitted to the City or the County of Los Angeles is entitled to no greater weight than if they were submitted to an individual manufacturer."

Every line of the record bearing in any way upon this statement and the "survey" to which it refers *is on one page*, reading as follows (R. 176):

"The Witness [Mr. Allen]. * * *

Now, we had to get our prices up and I know what applied to us applied to other manufacturers as well.

We had to get our prices up with the lowering of our volume and having to give increased compensation to our different dealers.

We were very, very happy to be able to get our prices up a little bit because we couldn't have existed on the prices that we had during the war.

Q. (By Mr. Lord). There was an unusual condition at the end of the war, was there not, war surplus?

A. Yes, Mr. Lord. As probably everybody knows the Government dumped tremendous quantities of our extinguishers on the market as surplus.

The Court. But that didn't prevent your prices from going up?

The Witness. No, it couldn't. We had to put them up. Their prices are still lower than ours—the surplus material is still being sold at a lower price than we sell it for. You can see them advertised in the Los Angeles papers here every Sunday. A 15-pound extinguisher will sell for $25.00 or $26.00 or $27.00 which is actually, probably, lower than our cost if we put our overhead in it."

Manifestly this testimony cannot be tortured into an application of the so-called "American Tobacco doctrine"[15] or to support a statement that the postwar price increase "must be viewed with suspicion" because made

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[15] *American Tobacco Co. v. United States* (1946) 328 U.S. 781, 805. There the Court pointed out that in 1931, "one of the worst years of financial and economic depression in the history of the

"in times of surplus *or when the natural expectation would be a general market decline*" (R. 239)!

During the war prices of fire extinguishers were at their lowest point, because manufacturing volume was at a peak and sales costs were eliminated (R. 175). After the war, volume dropped and the sales costs incident to civilian distribution were reimposed. The record is uncontradicted that it was because of these increased costs that C-O-Two increased its prices (R. 176). Fifteen-pound fire extinguishers were sold to the Government during the war, in tremendous lots, at $34.35 each, as compared with a prewar price of $49 each.[16] The surplus extinguishers dumped by the Government after the war sold for as low as $25 to $27 each—prices below C-O-Two's actual postwar cost of manufacture (R. 176). It is common knowledge that surplus materials were handled under adverse conditions; that their sales are not accompanied by the customary warranties and service guarantees of new products; that they do not sell at competitive prices with new products.[17]

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country," with "cost to the petitioners for tobacco leaf • • • lower than usual • • • and their manufacturing costs • • • declining," all three of the large tobacco manufacturers, on the same day, raised the list price of their leading cigarette brand. The court added "no economic justification for this raise was demonstrated."

And see: *Cement Mfrs. Assn. v. U. S.* (1925) 268 U.S. 588, 606, where the Court said "an artificial price level not related to the supply and demand of a given commodity *may* be evidence from which such agreement or understanding • • • may be inferred."

[16]R. 175 and price chart in the Appendix to this petition.

[17]Equally untenable, in what the court below seemed to consider a ruling on the "economic" aspects of this case, is its statement (R. 226):

"It is significant that the trial court also found that appellant C-O-Two had no cost records or other data indicating

B. In holding that "Additional circumstantial evidence of the existence of a conspiracy as charged in the indictment is found in the fact that the corporate defendants charged identical consumer prices for their products regardless of where they may be sold in the United States" (R. 237-238), the court below erroneously decided an important question of federal law in conflict with the decision of this Court in Trade Comm'n v. Staley Co. (1945) 324 U.S. 746.

In the case at bar, for the first time in the history of the antitrust laws so far as our research discloses, a fed-

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the manner or method of computing the sale price of the fire extinguishers manufactured and sold by it."

This statement, obviously intended to imply that C-O-Two *must* have relied solely on agreement with its competitors in establishing its prices, finds its sole "support" on two pages of the record—recording a stipulation between counsel (R. 109-110).

Counsel for the Government asked defendants' counsel to stipulate

> "• • • that a subpoena duces tecum was directed to him • • • calling for • • • '• • • all records, including studies, cost analyses, cost surveys, market analyses, statistical reports as well as all correspondence, data, memorandums, records of telephone and other conversations; circulars, announcements, bulletins, reports whether intra-office or otherwise, and all other written material which will show or indicate, (a) the manner or method of computing or arriving at retail prices and, (b) the basis upon which retail price changes were made • • •'"

and to stipulate further that upon receipt of the subpoena defense counsel wrote in reply, suggesting a conference and stating (R. 110):

> "'With respect to the form of subpoena duces tecum which you enclose in your letter, as a result of my inquiries I do not believe that C-O-Two has any materials required by paragraphs 1 and 2 but I do believe that the suggested conference will give you the information which you require and explain the situation in full.'"

The following then occurred (R. 110):

> "[Mr. McGrath, government counsel] I would like those facts be stipulated to.
>
> Mr. Lord: Certainly, your Honor. You mean with respect to the conference, too?
>
> Mr. McGrath: With respect to the conference. I didn't take part in the conference, myself.
>
> Mr. Lord: As I recall the conference was had in New York

eral court has held that where each of a number of competitors in an industry follows the practice of selling its products throughout the United States at a single delivered price, this is "circumstantial evidence of the existence of a conspiracy" to fix prices:

> "Additional *circumstantial evidence of the existence of a conspiracy* as charged in the indictment is found in the fact that the corporate defendants charged identical consumer prices for their products regardless of where they may be sold in the United States" (R. 237-238).

This ruling is not only in conflict with the holding of this Court in *Trade Comm'n v. Staley Co.* (1945) 324 U.S. 746, but is a decision of such far-reaching implications as to warrant, we submit, review by this Court. True the court below goes on to say (R. 238-239):

> "• • • uniformity of delivered price does not in and of itself create inference of collusion, where such uniformity has 'simple and local explanations in the nature of the market, the product and the transportation costs.'"

But the court immediately adds (R. 239):

> "But appellants do not produce any such explanation here."

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at the United States Attorney's office with Mr. Cline.
Mr. McGrath: We will stipulate to that.
Mr. Lord: Mr. Cline?
Mr. McGrath: That is right.
Mr. Lord: Of your New York office?"

It is, we submit, a miscarriage of justice for a court to hold that this record of normal preliminary procedures in working out pretrial problems in an antitrust suit supports a finding that C-O-Two, a corporation engaged in a nationwide business, has no cost records or any other data indicating the method of computing the sale price of its products.

Thus the court holds that the Government establishes a *prima facie* case of criminal conspiracy by showing, without more, that each of a number of competitors charges its customers the same delivered price throughout the country.

Tens of thousands of products in this country are priced at a single national delivered price.[18] A "uniform delivered price at all points of delivery" has been expressly sanctioned by this court:

> "But it does not follow that respondent * * * may not maintain a uniform delivered price at all points of delivery, for in that event there is no discrimination in price" (*Trade Comm'n v. Staley Co.* (1945) 324 U.S. 746, 757).

The citation of and quotation from *Milk and Ice Cream Can Institute v. Federal Trade Com'n* (7 Cir. 1946) 152 F.2d 478, 481, by the court below (R. 238) only adds breadth and serious significance to its decision. In the *Milk and Ice Cream Can* case the members of the industry, acting through an association, adopted a complex and artificial freight equalization plan under which identical prices for each member (regardless of his location) were computed for every delivery point throughout the country. Prices were different at different delivery points. Under this plan the respondents billed the purchaser the f.o.b. plant price plus freight and credited

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[18] A survey of American industry by the Federal Trade Commission a number of years ago revealed that of the firms interrogated, comprising members of thirteen major and other "miscellaneous" industries, more than twenty per cent quoted a uniform national delivered price (F.T.C., Price Bases Inquiry: The Basing-Point Formula and Cement Prices (1932): See for a summary, 15 L. & Contemp. Prob. (1950), p. 128).

the purchaser for the difference between the freight billed *and the freight from the plant of the competitor located nearest to such purchaser.* The credits were computed from freight rate books prepared by the association and distributed to members. Often these books were used only for the quotation of price, and in making the actual shipments and determining the routes the members referred to other traffic information. Daily reports were received with respect to the freight charged and equalized, and deviations from the plan were policed.[19]

It was with respect to this situation that the court in that case said:

> "Just how such an unnatural situation could be brought about by members of an industry without a plan or agreement is difficult, if not impossible to visualize."

But the court below now italicizes and applies this language to the simple practice of each of a number of competitors charging the same price to all of its customers throughout the country—a customary, accepted course of conduct by American business, involving no concurrence in artificial and complex formulae—and holds that proof of such a practice is *"Additional circumstantial evidence of the existence of a conspiracy,"* establishing a *prima facie* case for the Government *in a criminal case.*[20]

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[19]See in addition to the opinion of the Court of Appeals the decision of the Federal Trade Commission, 37 F.T.C. 419, 430 et seq.

[20]The scope of the ruling by the court is emphasized by the fact that in this case the Government failed, even, to produce evidence that freight constitutes a significant portion of the delivered price of portable fire extinguishers. As a matter of common sense, however (while the actual weights of the extinguishers *or*

C. In holding that mere membership in and attendance at regular meetings of a trade association is evidence of conspiracy by the members to fix prices, the court below decided an important question of federal law in conflict with decisions of this Court.

On this point the Government proved *only* that there is an association named "Fire Extinguisher Manufacturers' Association, Inc.," and that during the years 1946 to 1950 each company had employees on the carbon dioxide committee of that association who, at regular meetings of the association, attended meetings of the committee (supra, p. 9). Although the Government preceded the trial with extensive investigation under broad subpoenas (R. 109), it did not introduce one word in the record as to the activities of the association or the committee—not a memorandum, not a line of correspondence, no minutes, no oral testimony—not even a set of by-laws! Yet on this record the court below held that the Government had established that it "cannot be denied" that the defendants, through the association, had created "an opportunity • • • to discuss and agree upon prices and pricing policies on an industry-wide basis" (R. 228), and that this is a "plus factor" which aids in establishing a price-fixing conspiracy.

While the Court says that this fact, standing alone, would not point directly to the conclusion that a price-fixing conspiracy existed, still it treated the circumstance

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the applicable freight rates do not appear in the record), the only reasonable inference is that in the case, for example, of a 2½-pound (hand type) fire extinguisher, retailing for $22, or in the case of a 100-pound extinguisher retailing for $350, freight can hardly be a cost item comparable to the cost of the same item in the case of, say, cement, retailing for around $1.50 per 100 pounds.

of *mere membership* in a trade association as evidence of crime. This is contrary to numerous decisions of this Court and of other courts of appeals, including *Maple Flooring Assn. v. U. S.* (1925) 268 U.S. 563, 583, 584, 586; *Cement Mfrs. Assn. v. U. S.* (1925) 268 U.S. 588, and *Sugar Institute v. United States* (1936) 297 U.S. 553. As stated by this Court in the *Cement Mfrs.* case (268 U.S. at p. 606), proper activities of trade associations

> "are not in themselves unlawful restraints upon commerce and are not prohibited by the Sherman Act."

The decision of the court below simply substitutes a presumption of guilt for the presumption of innocence and right conduct.

Actually, the fact that the Government failed to find and introduce into evidence a single activity of the association which might even be criticized adds strongest credence to the sworn statements of the petitioners that at no time did they discuss or agree upon prices with their competitors (R. 183, 191). And this would seem to be particularly true in an industry dealing with public safety devices where standards of equipment are of concern to insurance underwriters, governmental agencies and industrial groups, and are the subject of detailed municipal, state and federal regulation.

We venture to say that every major industry in the United States has a trade association. The legality of such associations *per se* never before has been questioned. The decision below, as Judge Pope said, certainly "plows much new ground" (R. 245). It is erroneous and in conflict with the decisions of this Court.

D. In holding that similarity in appearance of the industrial products manufactured by each of the defendants is evidence of a price-fixing conspiracy, the court below so far departed from the accepted course of judicial proceedings as to call for an exercise of this Court's power of supervision.

As noted above, models of the same size extinguishers manufactured by the several defendants are virtually identical in appearance (R. 174). This fact, and this fact alone, was held by the court below to establish a *prima facie* case of *a price-fixing conspiracy* in a criminal case, casting on defendants the burden of *going forward with explanatory proof*. Emphasizing the scope of its ruling in this regard, the court said that defendants had failed to give

> "a satisfactory explanation for the similarity in color and other physical characteristics among the extinguishers manufactured by the different corporate defendants. *Appellants make no effort to explain* why these products, although manufactured by different companies * * * were indistinguishable save for their respective labels" (R. 229-230).[21]

No authority even remotely sustains the proposition that proof of similarity of ordinary industrial products *prima facie* establishes a price-fixing conspiracy. Again, the Court's reliance on *Milk and Ice Cream Can Institute v. Federal Trade Com'n* (7 Cir. 1946) 152 F.2d 478 (R.

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[21]The court did hold that the testimony of Mr. Allen, that the companies "are required to meet standards set up by the Underwriters' Laboratories in this respect, that we are required to put out certain sizes in order to obtain certain ratings * * *" (R. 229) was satisfactory explanation of what it called "standardization" in the *size* of the products.

Judge Pope was satisfied, on rehearing, that he had been "too much impressed with the fact of identity of appearance of the products of the several manufacturers" (R. 245).

229) emphasizes its error. In that case the proof may be summarized:

Court of Appeals
152 F.2d 478

The record showed "a continuing effort and urging" on the part of the Institute and its members to have the cans manufactured in uniform classifications. The court said (p. 482):

"The meticulous effort disclosed by the record by which petitioners standardized their products is also a strong circumstance in support of the Commission's finding that their activities were the result of an agreement."

Federal Trade Commission
37 F.T. C. 419, 434

The Commission found that the respondents by agreement eliminated models and styles of cans, changed the design and otherwise standardized the product independently of and beyond any requirements for standardization prescribed by federal or state law. As an example of such agreement it was pointed out that the evidence showed that uniform gauges and weights for milk cans had been worked out after a series of discussions. All respondents were asked to report on which styles and sizes of cans should be manufactured and which ones eliminated. After these reports were in, a committee made a report to a meeting of the Institute members stating the recommendations. These recommendations were adopted by vote. Thereafter from time to time various recommendations were made by the committee to the members at meetings. At a meeting on January 23, 1940, Hunter (secretary of the Institute) pointed out that all members when making improvements or developing some new construction in their equipment should either furnish a sketch of the item or a sample to other respondent members.

The Government made no such showing in this case. It relied upon the *single fact* that these industrial implements are similar in appearance.

Fire extinguishers are not products such as clothing or jewelry, manufactured to appeal to individual tastes. They are industrial tools, functional in nature. As Judge Pope said:

> "* * * no one has ever proposed that an inference of unlawful price-fixing arises from the identity of shovels, hoes, rakes or paint brushes" (R. 245).[22]

The holding of the court below that the burden had shifted and defendants were required to explain "similarity in color" illustrates the extreme of its decision. Similarity in color of fire extinguishers arises from the fact that they are red. While the Government's argument (quoted in footnote ~~21~~ 22) suggests that certain manufacturers, in the absence of conspiracy, might have painted their extinguishers green to test the sales appeal of that color, we submit it is *unreasonable* to conclude that fire extinguishers are painted red by each of several manufacturers pursuant to a conspiracy, and *reasonable* to conclude that without any conspiracy at all they are painted red like fire engines to associate them with their intended use.

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[22]This point was referred to by Government counsel in the oral argument in the court below:

"Judge Pope: I suppose there is no reason why a manufacturer of this kind of product would be interested in getting out an attractive looking extinguisher.

Mr. Dixon: No, I do not think there would be particularly, Judge. I suppose an extinguisher would do the job just as well if it were painted green or some other decorative color, but the fact is whether that would have some sales appeal to some people because it was painted a different color or not, I do not know."

As to other physical characteristics, the horn attached to each extinguisher is a functional patented device to permit the discharge of carbon dioxide without the entrainment of air.[23] In other external physical respects the extinguisher consists of a steel container, cylindrical in form with rounded ends to supply the strength required to withstand the tremendous pressure of the retained carbon dioxide gas.[24] Similarity in these functional respects has no more significance than, for example, the fact that the surface of wings on all airplanes are curved so as to provide a lifting force.

While the foregoing demonstrates the untenable nature of the decision of the court below, we point out that the record *affirmatively* rebuts any possible inference of conspiracy among the defendants to standardize their products. In view of the fact that it takes some time to tool up and put out a new model, it might be said that some inference of previous communication between the defendants might arise if it were shown that new models were put out simultaneously by all defendants. But the price lists introduced by the Government itself disclose that *at no time* during the period involved has a new model been put out at the same time by any two or more defendants. On the contrary, each new model was brought out by one defendant alone, and the other defendants (if any) met this competition by manufacturing similar mod-

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[23]See *Randolph Laboratories v. Specialties Development Corp.* (D. N.J. 1949) 82 F.Supp. 316 (affirmed, 178 F.2d 477).

[24]For a picture of the fire extinguishers of one defendant, see R. Vol. II, 201.

els only after time periods varying from six months to more than a year.[25]

E. In holding that an inference of conspiracy to fix prices can be drawn from the fact that each of the defendants followed the practice of suggesting resale prices to its dealers the court below decided an important question of federal law in conflict with numerous decisions of this and other federal courts.

The court below quoted in full the stipulated fact that each of the corporate defendants followed the practice of suggesting resale prices to its respective dealers and that each dealer "as a matter of sales policy, generally adhered to the published consumer prices suggested" (R. 230). The stipulation further stated that each dealer would testify that "*he* understood" that the defendant manufacturer "required" that such product be sold at the suggested resale prices. The stipulation meticulously referred to the prices as "suggested" prices (a well-understood legal and commercial term significantly different from "agreed upon" prices).

Solely on the basis of this stipulation the court held that the Government had established that "defendant corporations controlled the resale prices of the product" (R. 231) and "agreed not to sell or deliver • • • to dealers who failed to maintain and adhere to the prices • • • agreed upon and fixed by the defendants" (R. 225).

Manifestly the stipulation does not establish even that any manufacturer *acting independently* agreed with its own dealers as to resale prices. But, beyond this, it lends

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[25]This is shown in what we believe is a "self-reading" chart, entitled "Comparison of Models of Fire Extinguishers" attached as part of the Appendix to this petition.

no support to the charge in the indictment, which is that defendants agreed *among themselves* to require their dealers to maintain resale prices.

It cannot be doubted that every manufacturer has an *individual* economic interest in the practice of suggesting resale prices to dealers—an interest that has legal sanction in numerous decisions of this and other federal courts.

United States v. Colgate & Co. (1919) 250 U.S. 300;

U. S. v. Bausch & Lomb Co. (1943) 321 U.S. 707, 729;

Lorain Journal v. United States (1951) 342 U.S. 143, 155;

Adams-Mitchell Co. v. Cambridge Distributing Co. (2 Cir. 1951) 189 F.2d 913, 916;

Chicago Flexible Shaft Co. v. Katz Drug Co. (3 Cir. 1934) 72 F.2d 548;

Harriet Hubbard Ayer, Inc. v. Federal Trade Commission (2 Cir. 1926) 15 F.2d 274.

To hold, as the lower court did, that the suggesting of resale prices for its products by each of a number of competing manufacturers is evidence of a conspiracy among those manufacturers to fix prices, is necessarily in conflict with the cases cited above, since, under these decisions, the Government has proved only that each manufacturer is following a common and approved business practice.

It is apparent from the court's opinion that it was influenced to its holding by the evidence (which occupies most of this record) relating to the two instances when

C-O-Two admonished its own dealers for quoting below C-O-Two's suggested resale prices. But there is not one word in the record which connects this action with any other defendant—no showing of any kind from which any inference can be drawn that C-O-Two acted pursuant to any agreement with any other defendant, or even with the knowledge of any other defendant.[28]

As we have said, the record discloses that the Government made an extensive investigation before the trial of this case. If it had found *any* evidence even remotely connecting any "policing" activities of any defendant with any other defendant, or even if it had found any evidence of "policing" activities undertaken independently by any defendant other than C-O-Two, it certainly would have introduced such evidence. Instead the record is bare.

The indictment here did not charge a "vertical" conspiracy between C-O-Two and its dealers; it charged a "horizontal" conspiracy between C-O-Two and the other manufacturers. Nothing in the action of C-O-Two with respect to its own dealers was connected in any way with the other defendants and has no bearing on the conspiracy alleged.

CONCLUSION.

Each of the actions of each of the defendants proved in this case is a normal business practice characteristic

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[28]Compare *Interstate Circuit v. U. S.* (1939) 306 U.S. 208; *U. S. v. Masonite Corp.* (1942) 316 U.S. 265; *United States v. Gypsum Company* (1948) 333 U.S. 364.

of a competitive market.[27] There is lacking even the most tenuous thread which could be said to connect these separate actions. *All* of them normally and reasonably can be expected to co-exist in a competitive market. They cannot simply be lumped together, contrary to reason and authority, to support a finding of conspiracy.

This is a criminal case. The Government had the burden of proof. Quite apart from the conflict of decisions apparent on the face of the opinion of the court below we urge that this Court, in determining whether

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[27]The indecision of the court below with respect to each of these actions (which it characterizes as "plus factors" (R. 228, 240)) is evidenced in its opinion.

With respect to uniformity of price it says that the

> "• • • question is not whether identical prices throughout the industry in and of itself establishes a conspiracy. We would be deciding the unnecessary to answer that question" (R. 240).

With respect to membership in the trade association it says that this fact "standing alone and examined separately, could not be said to point directly to the conclusion that the charges of the indictment were true beyond a reasonable doubt • • •" (R. 228).

With respect to similarity in the appearance of defendants' products, it is convinced only that this condition "facilitates the maintenance of price uniformity" (R. 229).

With respect to the stipulation regarding resale prices it acknowledges "that there are several legitimate inferences that may be drawn from the stipulated testimony • • •" (R. 231).

With respect to uniformity of delivered prices it hastens "to agree with appellants' statement that uniformity of delivered price does not in itself create inference of collusion • • •" (R. 238-239).

With respect to postwar price increases, it goes only so far as to say that these must be "viewed with suspicion" (R. 239).

With respect to "absence" of cost records, it says that this is "significant" (R. 226).

In this situation, we refer to the language of this Court in *Baumgartner v. United States* (1944) 322 U.S. 665, 670:

> "We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt • • •."

certiorari should be granted, consider the impact of the court's ruling.

Must all businessmen now charge different prices than their competitors on standard products, even though the history of price changes rebuts any inference of agreement or even prior knowledge?

Must they, in order to avoid "criminal uniformity," refrain from meeting the prices of their competitors?

Must thousands of them abandon their practice of charging a single delivered price throughout the country?

Must they resign from every trade association?

Must each now devise some method to change the shape and style of its ordinary industrial products so as to make them differ from those of their competitors? To achieve this, must essential functional parts be eliminated or redesigned?

In sum, must businessmen artificially and consciously be different to escape the "irresistible inference" that their *normal* similarities are criminal?

We concur in the repeated statements of the courts that the Sherman Act expresses a policy vital to our democractic institutions. We believe it to be a policy endorsed by the overwhelming majority of American businessmen. But the fair objectives of this policy cannot, we respectfully submit, be achieved unless the same scrupulous regard be given to sustaining the fair and normal conduct of businessmen as is given to the condemnation of practices which do not meet that test.

For the reasons above stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
October 3, 1952.

Respectfully submitted,

FRANCIS R. KIRKHAM,
RICHARD J. MACLAUBY,
WILLIAM E. MUSSMAN,
Attorneys for Petitioners.

PILLSBURY, MADISON & SUTRO,
Of Counsel.

(Appendix Follows.)

Appendix

DARK PAGE BLEED THRU

The following schedule sets out the record reference (by page) in Volume II, Book of Exhibits, of price sheets of the defendant corporations from which the comparative list price chart was compiled:

Price Moves	C-O-Two	Kidde	American-LaFrance	General Pacific
No. 1	R. 276	R. 272	R. 274	
No. 2	R. 265	R. 266	R. 267	
No. 3	R. 246 (12/1/42) R. 244 (7/15/43)	R. 249 (10/5/42) R. 245 (2/10/43) R. 243 (8/1/43)	R. 247 (1/15/43) R. 243 (8/27/43)	
No. 4	R. 241			
No. 5	R. 233	R. 236	R. 234	R. 232
No. 6	R. 228	R. 230	R. 225	R. 222
No. 7	R. 216	R. 219	R. 208	R. 217
No. 8	R. 214	R. 205	R. 206	R. 210